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In The

Supreme Court of the United States

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WILBER HARDEN FOSTER,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petition for Writ of Certiorari

James F. Walker
Counsel of Record
WALKER & BULLARD
207 East Main Street
Post Office Box 223
Gibsonville, NC 27249
(336) 449-4909

Counsel for Petitioner

THE LEX GROUP ♦ 1205 East Main Street ♦ Suite 2 East ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3256

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QUESTIONS PRESENTED FOR REVIEW

I. IS THE NORTH CAROLINA UNAUTHORIZED SUBSTANCE TAX A CRIMINAL PENALTY AND DOES THE PETITIONER'S SUBSEQUENT CONVICTION AND SENTENCE FOR POSSESSION OF THE SAME CONTROLLED SUBSTANCE UPON WHICH THE TAX WAS BASED VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION, THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AND THE "LAW OF THE LAND" CLAUSE OF ARTICLE I, SECTION 17 OF THE NORTH CAROLINA CONSTITUTION?

II. WAS A MOTION TO SUPPRESS EVIDENCE OBTAINED BY A SEARCH WARRANT DATED MARCH 24, 1997 IMPROPERLY DENIED AND DID THE DENIAL OF THE PETITIONER'S MOTION TO SUPPRESS AND THE SUBSEQUENT JUDGMENT INCARCERATING THE DEFENDANT BASED ON THE EVIDENCE WHICH WAS NOT SUPPRESSED VIOLATE THE DEFENDANT'S FOURTH AMENDMENT RIGHT TO BE FREE FROM SEARCH AND SEIZURE WITHOUT PROBABLE CAUSE?

LIST OF PARTIES

All parties appear in the caption of the case and no parent corporations or subsidiaries exist in this litigation.

CORPORATE DISCLOSURE

There are no corporate parties to this appeal.

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The Opinion of the North Carolina Court of Appeals is styled, State v. Foster, No. COA 98-642, slip op. (N.C. App. April 6, 1999). The opinion has not been reported and it is included in the Appendix ("App."). A Petition to the Supreme Court of North Carolina and Petition for Writ of Certiorari made to the Supreme Court of North Carolina was denied in an Order styled State v. Foster, 198 P 99, slip op. (N.C. July 22, 1999), which is also not reported and is included in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the North Carolina Court of Appeals was entered on April 6, 1999. The Petitioner thereafter, on April 28, 1999, filed a Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Supersedeas, and Petition for Writ of Certiorari in the Supreme Court of North Carolina requesting that the Supreme Court of North Carolina review and reverse the decision of the North Carolina Court of Appeals. By order dated July 22, 1999, the Supreme Court of North Carolina denied the Petitioner's request to review the decision of the North Carolina Court of Appeals and entered an Order dismissing the appeal. State v. Foster, 198 P 99, slip op. (N.C. July 22, 1999) (App. 1). This Petition for a Writ of Certiorari is filed within 90 days of that date and the jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN CASE

U.S. Const., amend. IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const., amend. V

No person shall . . . be subject for the same offence to be put twice in jeopardy of life or limb . . . nor be deprived of life, liberty, or property, without due process of law . . ."

U.S. Const., amend. XIV, section 1

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law . . ."
N.C.G.S. § 105-113.105 (1997) et seq. (Text is set forth in pages 59-67 of the Appendix).

STATEMENT OF THE CASE

On March 24, 1997, Officer John T. Cobb of the Alamance County Sheriff's Department submitted an Application for Search Warrant with an attachment, alleging facts purporting to establish probable cause for the issuance of a search warrant. (App. 47). In the section entitled "Facts to establish probable cause," Officer Cobb alleged that, "[I]n the last twelve months, our division, along with Burlington P.D., confidential informants and sources has received information on Mr. Harden [sic] drug activity at his residence." (App. 54). The only other information used to support probable cause for the issuance of the warrant was the statement of Michael Grey Jeffrey, who after being arrested for possession of marijuana and weapons and after he had admitted that the drugs and weapons were his, alleged that he had gotten the marijuana from "Harden Wilber Foster" on March 22, 1997. (App. 54). The Officer stated in his affidavit that this statement by Jeffrey was made, "in hopes for assistance in the future and based on his declaration of penal interest." (App. 54). Based on the Application for Search Warrant, the magistrate issued a Search Warrant on March 24, 1997. (App. 49).

On March 24, 1997, officers from the Alamance County Sheriff's Department executed the Search Warrant at the residence of the Defendant and recovered various items listed in an Inventory of Seized Property. (App. 57). Included in these items were substances believed to be controlled substances. Based on the recovery of these items, the Defendant was arrested and charged with possession with intent to sell and/or deliver marijuana, possession of more than one and one-half ounces of marijuana, possession of cocaine, keeping or maintaining a dwelling for the purpose of using, keeping and/or selling cocaine, possession of cocaine with intent to sell and/or deliver, possession of drug paraphernalia, resist, obstruct and/or delay a public officer, and possession of non-tax paid whiskey.

As a result of the alleged possession of these controlled substances, one day following the date of offense, the North Carolina Department of Revenue issued a Notice of Controlled Substance Tax Assessment against Wilber Harden Foster that assessed "tax" on the seized controlled substances in the amount of $31,465.00, a "penalty" in the amount of $15,732.50 and "interest" in the amount of $235.99 for a total of $47,433.49. (App. 32). (The documents relating to the assessment of the Unauthorized Substance Tax, N.C.G.S. § 105-113.105 (1997) et seq., and the sale of property to satisfy this tax are found in the appendix and original certified copies are attached to Defendant's Motion for Appropriate Relief filed in the North Carolina Court of Appeals as an Appendix). A Certificate of Tax Liability certifying that Wilber Harden Foster was indebted to the State of North Carolina for these amounts was entered on the same day, March 25, 1997, and was filed in Alamance County, North Carolina on April 4, 1997. (App. 38). On that same date, March 25, 1997, a Warrant for Collection of Taxes was issued commanding that any property owned by Wilber Harden Foster be levied upon and sold to satisfy the tax assessment. (App. 40). Thereafter, on June 14, 1997, the North Carolina Department of Revenue conducted a sale of the Defendant's property to satisfy a portion of this tax. A "Noblia" mens watch, a mens diamond ring with a 1.14 carat diamond and a mens coin ring, dated 1881, all of which property was owned by the Defendant, was sold and the funds were delivered to the North Carolina Department of Revenue. (App. 45-46).

On April 21, 1997, the Defendant was indicted and arrested again for trafficking in a controlled substance by possessing more than 28 grams or more but less than 200 grams of cocaine. The controlled substance upon which the trafficking charge was based was the same controlled substance that was recovered in the search on March 24, 1997 upon which the previous arrest was based and upon which the assessment of the unauthorized substance tax was based.

On January 17, 1998, the Petitioner entered a plea of guilty to the charge of trafficking in cocaine and reserved his right to appeal. (App. 18-22). The Petitioner was thereafter placed into custody and released under a cash bond pending resolution of the matters of his appeal under certain terms and conditions. The Petitioner thereafter gave notice of appeal of the judgment sentencing him to a minimum active term of thirty-five months and a maximum active term of forty-two months as well as notice of appeal of a previous denial of a motion to suppress. On July 9, 1998, the Defendant filed a Motion for Appropriate Relief in the North Carolina Court of Appeals pursuant to N.C.G.S. § 15A-1415 (1997). (App. 23).

In an opinion filed April 6, 1999, the North Carolina Court of Appeals addressed the Defendant's Motion for Appropriate Relief on the merits and denied the motion, holding that although the United States Court of Appeals for the Fourth Circuit had found the North Carolina Unauthorized Substance Tax to be a criminal penalty, the Supreme Court of North Carolina had previously ruled differently and that the North Carolina Court of Appeals was constrained to follow the prior decision of the Supreme Court of North Carolina. Therefore, the North Carolina Court of Appeals found that "defendant's conviction following assessment of the controlled substance tax did not violate defendant's rights against multiple punishments of the same offense." State v. Foster, COA 98-642, slip op., (N.C. App., April 6, 1999). (App. 12). The North Carolina Court of Appeals also affirmed the trial court's decision in denying the Petitioner's motion to suppress. (App. 5-11).

REASONS FOR GRANTING THE WRIT

Introduction:

The North Carolina Court of Appeals has rendered an opinion in this case which they acknowledge is in direct opposition to the ruling of the United States Court of Appeals for the Fourth Circuit in the decision of Lynn v. West, 134 F.3d 582 (4th Cir. 1998), cert. denied, 119 S.Ct. 47 (1998). The Supreme Court of North Carolina has refused to review the decision and has decided cases prior to the case sub judice upon which the North Carolina Court of Appeals relied. This provides a basis for review under Rule 10(b) of the Rules of the Supreme Court of the United States.

The decision of the North Carolina Court of Appeals in this case is also in direct opposition to the of the rationale behind the decision of the Supreme Court of the United States in Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) and as a result, a basis for review also exists under Rule 10(c) of the Rules of the Supreme Court of the United States.

1. THE NORTH CAROLINA UNAUTHORIZED SUBSTANCE TAX IS A CRIMINAL PENALTY AND THE CONVICTION AND SENTENCING OF THE PETITIONER FOR POSSESSION OF THE SAME CONTROLLED SUBSTANCE UPON WHICH THE TAX WAS BASED VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION, THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AND THE "LAW OF THE LAND" CLAUSE OF ARTICLE I, SECTION 17 OF THE NORTH CAROLINA CONSTITUTION.

1. The North Carolina Unauthorized Substance Tax is a criminal penalty as defined by the federal courts.

In Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994), this Court considered the issue of whether a similar Montana drug tax was punitive. In Kurth Ranch, Montana law enforcement officers raided the farm of the Kurth's, seized marijuana plants, placed the Kurths under arrest, and charged them in a state court proceeding with drug charges. Id. at 767. After the Kurths pleaded guilty to drug charges, the Montana Department of Revenue attempted, in a separate proceeding, to collect a state tax imposed on the possession of dangerous drugs. Id. This Court held that, "Taken as a whole, this drug tax is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of double jeopardy analysis." Id. at 783. This Court then barred the enforcement of the Montana Drug Tax following a criminal proceeding, holding that, "it is a second punishment within the contemplation of a constitutional protection that has 'deep roots in our history and jurisprudence,' and therefore must be imposed during the first prosecution or not at all." Id. at 784 (quoting United States v. Halper, 490 U.S. 435, 440 (1989)). Despite the decision of this Court in Kurth Ranch and the marked similarity of the North Carolina statute to the Montana statute, the North Carolina Department of Revenue continued to enforce the North Carolina Unauthorized Substances Tax, N.C.G.S. § 105-113.105 (1997) et seq.

In Lynn v. West, 134 F.3d 582 (4th Cir. 1998), cert. denied 119 S.Ct. 47 (1998), the United States Court of Appeals for the Fourth Circuit addressed the issue of whether the North Carolina Unauthorized Substance Tax, N.C.G.S. 105-113.105 et seq., is a criminal penalty. As in the case sub judice, the Department of Revenue asserted that Defendant Lynn owed a tax of $200 per gram on the 970 grams of cocaine taken from his house. Id. at 584. The Court held that "the Drug Tax is in

reality a criminal penalty under Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994)." Id.

This Court discussed four features that caused the Montana tax in Kurth Ranch to be a criminal penalty: (1) the high tax rate, Id. at 780-81, (2) the deterrent purpose of the tax, Id., (3) the fact that the tax was conditioned on the commission of a crime, Id. at 781-82, and (4) the fact that the tax was levied on "'possession' of goods that no longer exist and that the taxpayer never lawfully possessed." Id. at 783. The Court of Appeals for the Fourth Circuit discussed each of these factors and found that the North Carolina Unauthorized Substance Tax was even more punitive than the Montana tax analyzed in Kurth Ranch. Lynn v. West, 134 F.3d 582, 589 (4th Cir. 1998). The Court of Appeals for the Fourth Circuit found as to the first issue that, "The rate of taxation imposed by the North Carolina Drug Tax yields an even higher penalty than the tax in Kurth Ranch." Id. As to the second factor, the court found that, "The addition of the penalty makes the effective rate of taxation 1,600 percent, or sixteen times the market value." Id. at 590. As to the third factor, the court found that the North Carolina tax, like the Montana tax, was conditioned on the commission of a crime. Id. Finally, the North Carolina Unauthorized Substance Tax, like the Montana tax, has no relationship to lawful possession. Id. at 591. The Court of Appeals for the Fourth Circuit cited the Kurth Ranch decision where this Court held that "[a] tax on 'possession' of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character." Id., citing Department of Revenue v. Kurth Ranch, 511 U.S. 767, 783 (1994).

Other courts have followed the rationale applied in Lynn. The Supreme Court of Massachusetts decided the case of Commissioner of Revenue v. Mullins, 428 Mass. 406, 702 N.E.2d 1 (1998) in which it followed the analysis of the federal courts and found that the controlled substance tax in Massachusetts was a criminal penalty for purposes of double jeopardy analysis. Id. at 8.

In the case sub judice, unlike Kurth Ranch, the criminal punishment imposed by the North Carolina Unauthorized Substance Tax occurred prior to the punishment for the criminal proceeding. As a result, it is the subsequent criminal punishment under the State criminal proceedings that is in violation of the Double Jeopardy Clause of the United States Constitution. In Lynn, like the present case, the punishment under the criminal charges was imposed subsequent to the imposition of the Drug Tax. The Court held that the Double Jeopardy clause did not apply only because the subsequent prosecution was brought by the United States rather than the State of North Carolina. Lynn, 134 F.3d 582, 593. Since the criminal prosecution in the present case was brought by the State of North Carolina, the subsequent indictment and punishment for the criminal offenses by the State of North Carolina after the imposition of the Unauthorized Substance Tax by the State of North Carolina violates the Double Jeopardy Clause of the fifth amendment and the Due Process Clause of the fourteenth amendment. The fact that the prior punishment was a "tax" assessment is of no consequence. The United States Government argued in United States v. Halper, 490 U.S. 435 (1989) that the constitutional prohibition against multiple punishments, "applied only to punishments meted out in a criminal proceeding." Department of Revenue v. Kurth Ranch, 511 U.S. 767, 802 (Justice Scalia dissenting, citing Brief for United States in United States v. Halper, O.T.1988, No. 87-1383, pp. 11-12, 21-24.) Even Justice Scalia in his dissent in Kurth Ranch held that, "[I] found, and continue to find, that distinction incoherent. If the Constitution prohibits multiple punishments, the nature of the proceeding in which punishment is imposed should make no difference." Kurth Ranch, 511 U.S. at 802. However, despite the ruling of this Court, the North Carolina Department of Revenue completely disregarded the decision in Kurth Ranch and continued thereafter to enforce the North Carolina Unauthorized Substance Tax.

2. The Petitioner has not waived his right to collateral relief as a result of his guilty plea.

As a general rule, when a Defendant enters a guilty plea, he waives his right to attack his sentence collaterally through a double jeopardy challenge. United States v. Broce, 488 U.S. 563 (1989). There are exceptions to this general rule. One exception exists if the plea was not entered knowingly and voluntarily. Id. Another exception exists if the government had no right to bring the charges at all. Id.; see also Menna v. New York, 423 U.S. 61 (1975); Blackledge v. Perry, 417 U.S. 21 (1974); United States v. Brown, 155 F.3d 431 (4th Cir. 1998). Another exception exists where the state appellate court addressed the double jeopardy issue on appeal, despite the Petitioner's failure to raise double jeopardy objections at the trial court level. Brown v. Foltz, 583 F.Supp. 1063 (E.D.Mich 1984), aff'd, 754 F.2d 372 (1985); see Cook v. Borden Kircher, 602 F.2d. 117 (6th Cir 1979), cert. denied, 444 U.S. 936 (1979); Hockenbury v. Sowders, 620 F.2d 111 (6th Cir. 1980), cert. denied, 450 U.S. 933 (1981). Another exception exists when the record does not reflect that the Petitioner "understandably and knowingly" waived the state court's consideration of the defense. See Alvarez v. Estelle, 531 F.2d 1319, 1321 (5th Cir. 1976), rehng. denied, 534 F.2d 1407, cert. denied, 429 U.S. 1044 (1977), rehng. denied, 429 U.S. 1124 (1977).

1. The Petitioner did not "knowingly and understandably" waive the state court's determination of a "known right or privilege."

A basis for collateral review lies in the fact that the Defendant did not knowingly and understandably waive the state court's determination of a federal double jeopardy claim. "The classic definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458, 464, 'an intentional relinquishment or abandonment of a known right or privilege,' furnishes the

controlling standard." Fay v. Noia, 372 U.S. 391, 439 (1963), quoting, Johnson v. Zerbst, 304 U.S. 458, 464 (1938). At the time that the Defendant was charged, the North Carolina appellate courts had recently addressed the issue of whether or not the North Carolina Controlled Substance Tax was a criminal penalty in the cases of State v. Ballenger, 123 N.C. App. 179, 472 S.E.2d 572 (1996), aff'd, 345 N.C. 626, 481 S.E.2d 84, cert. denied, 139 L.Ed.2d 29 (1997) and State v. Creason, 123 N.C. App. 495, 473 S.E.2d 771 (1997), aff'd, 346 N.C. 165, 484 S.E.2d 525 (1997). Despite the ruling of this Court in Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994), the North Carolina appellate courts held that the North Carolina Unauthorized Substance Tax was not a criminal penalty. The North Carolina Court of Appeals was divided in the Ballenger decision and the North Carolina Supreme Court affirmed the divided majority decision per curiam. 345 N.C. 626, 481 S.E.2d 84, cert. denied 139 L.Ed.2d 29 (1997). In Lynn v. West, 134 F.3d 582 (4th Cir. 1998), cert. denied, 119 S.Ct. 47 (1998), the United States Court of Appeals for the Fourth Circuit established that the North Carolina Unauthorized Substance Tax was in fact a criminal penalty. The decision of the Fourth Circuit Court of Appeals in the Lynn case was based on the same statute that the North Carolina Supreme Court considered in the Ballenger case. The North Carolina appellate courts have firmly established the view that North Carolina courts "[are] not bound by the pronouncements of the United States Circuit Courts." Haynes v. State, 16 N.C. App. 407, 192 S.E.2d 95 (1972). Consequently, to deem the Defendant's failure to raise the double jeopardy claim at trial and his guilty plea a bar to raising the issue collaterally for eventual consideration by a federal court would require a Defendant to bring a case to trial on all charges, solely for the purpose of raising a defense which North Carolina courts had definitively said did not exist and would presumably deem frivolous. Regardless of how the federal courts might rule on the issue, the North Carolina appellate courts refused to recognize, and

continue to refuse to recognize and follow the ruling of the federal circuit court in the Lynn case and the rationale of this Court in the Kurth Ranch decision, and do not consider them binding upon state court proceedings. To take his case to trial or to refuse a plea offer, merely to set forth a defense at the state court level which the state courts would, under state law, deem directly contrary to a recently decided North Carolina Supreme Court case, would subject the Defendant to any potential punishment available for the crimes charged, whether or not those crimes were truly subsequent criminal penalties that violated his rights under the fifth amendment. The Defendant would then be left to hope that his case would be reviewed by a federal court. This Court has recognized that when a defendant does not appeal an issue because of the possibility of a more severe sentence on retrial, this does not necessarily constitute a "waiver" of a defense that is asserted collaterally for purposes of relief from the underlying sentence. Fay v. Noia, 372 U.S. 436, 439 (1963).

The fact that the Petitioner did not assert a double jeopardy claim at trial cannot constitute "an intentional relinquishment or abandonment of a known right or privilege," since there was no "known right or privilege" at the state court level because the North Carolina Supreme Court has set forth its position on the North Carolina Unauthorized Substance Tax and has deemed that position to be paramount over any contrary view that had been or would be expressed by the federal circuit courts.

2. The North Carolina Court of Appeals addressed the Petitioner's claim of double jeopardy on the merits.

When a state appellate court reaches the issue of a double jeopardy argument raised in a motion for collateral relief, the issue is proper for review by a federal court, despite what might otherwise be deemed a procedural waiver of that

personal defense. Brown v. Foltz, 583 F.Supp. 1063 (1984), aff'd, 754 F.2d 372 (1985), see also Cook v. Borden Kircher, 602 F.2d 117 (6th Cir. 1979), cert. denied, 444 U.S. 936 (1979). On direct appeal for review of a state court decision, there is a presumption that a state court's dismissal of a petition for collateral relief does not rest on an independent and adequate state ground and that the state court has rejected the petitioner's federal claims on the merits." Michigan v. Long, 463 U.S. 1032 (1983). The presumption in favor of federal review applies when it appears that the state court judgment was interwoven with federal law. Id.; see also Coleman v. Thompson, 501 U.S. 722 (1991).

In the present case, the North Carolina Court of Appeals addressed the Petitioner's Motion for Appropriate Relief in which he asserted that his subsequent conviction violated his right against being placed twice in jeopardy for the same offense and his due process rights which are accorded to citizens by the fifth and fourteenth amendments to the United States Constitution. The North Carolina Court of Appeals chose to address the issue on its merits and denied the Petitioner's request, noting that it was doing so in direct opposition to a recent federal decision by the United States Court of Appeals for the Fourth Circuit. When a state appellate court reaches a double jeopardy issue raised in a motion for collateral relief, the issue is proper for review by a federal court, despite what might otherwise be deemed a procedural waiver of that personal defense. Brown v. Foltz, 583 F.Supp. 1063 (1984), aff'd 754 F.2d 372 (1985). As a result, the issue is properly before this Court for review of the continued refusal of the North Carolina appellate courts to accept the law of our federal courts interpreting the North Carolina Unauthorized Substance Tax as a criminal penalty.

II. THE MOTION TO SUPPRESS THE EVIDENCE OBTAINED BY THE SEARCH WARRANT DATED MARCH 24, 1997 WAS IMPROPERLY DENIED BY THE NORTH CAROLINA STATE COURTS AND THE DENIAL OF THE PETITIONER'S MOTION TO SUPPRESS AND THE SUBSEQUENT JUDGMENT INCARCERATING THE DEFENDANT BASED ON THE EVIDENCE WHICH WAS NOT SUPPRESSED VIOLATES THE DEFENDANT'S FOURTH AMENDMENT RIGHT TO BE FREE FROM SEARCH AND SEIZURE WITHOUT PROBABLE CAUSE.

In Illinois v. Gates, 462 U.S. 213 (1983), this Court established the modern test for determining whether a search warrant is supported by probable cause. The existing "two-pronged test" was abandoned and a totality of the circumstances analysis of probable cause was adopted. Id. at 238-39. This analysis was adopted by the North Carolina Supreme Court in State v. Arrington, 311 N.C. 633 (1984).

In the case sub judice, there is no personal knowledge by the officer regarding witnessing any controlled buy or drug traffic at the residence, and there is no allegation that the Defendant has any prior record for selling drugs. The only two sources of information are the information provided by an individual, Michael Grey Jeffrey, who had previously been arrested for possession of a controlled substance, and a reference to confidential (but not reliable) informants.

1. Information provided by confidential informants in the affidavit is insufficient to contribute to a finding of probable cause to believe that controlled substances would presently be found at the Defendant's residence.

When officers use information that they have received from a confidential informant, they have a greater burden to show that the person is credible and that the information is reliable than when they receive information from a crime victim, an uninterested witness, or from a "citizen-informant." United States v. Foolade, 703 F.2d 180 (5th Cir. 1983); United States v. Phillips, 727 F.2d 392 (5th Cir. 1984). This is especially true when the confidential informant is presumably involved in criminal activity or is associated with the criminal environment. Id. While an affidavit may be based on hearsay information, "the affidavit in such case must contain some of the underlying circumstances from which the affiant's informer concluded that the articles sought were where the informer claimed they were, and some of the underlying circumstances from which the affiant concluded that the informer was credible and his information reliable." State v. Dailey, 33 N.C. App. 600, 602; 235 S.E.2d 917, 919, appeal dismissed, 293 N.C. 362, 237 S.E.2d 850 (1977); quoting State v. Campbell, 282 N.C. 125, 129, 191 S.E.2d 752, 755 (1972).

In the warrant in the present case, the application makes no statements regarding the underlying circumstances from which the confidential informant concluded that there were drugs in the residence or how the informant gained this purported knowledge, nor does it make a statement regarding the reliability of the confidential informant. Moreover, it makes no statement regarding the time frame in which the confidential informant's statements were made, except to state that they were made in the last twelve months. These statements have no assurances of credibility and, even if credible, would be stale. A confidential informant is not

reliable without information regarding the past performance of the informant or some other means of verifying the information provided. United States v. Delgadillo-Velasquez, 856 F.2d 1292 (9th Cir. 1988). Thus, the information provided by the "confidential sources" in the application in the present case does not further the allegation that there is probable cause to believe that contraband could then be found on the subject premises.

2. Information provided by Michael Grey Jeffrey lacks sufficient credibility to stand alone as a basis for probable cause to search a residence.

The only other basis for the warrant is the statement by Michael Grey Jeffrey. Mr. Jeffrey is not a crime victim, an uninterested witness or "citizen-informant." Generally, officers applying for a search warrant may state information in the affidavit that they have received from a crime victim, witness, or other "citizen-informant" without indicating that person's credibility or reliability, unless the person has a motive to falsify information or unless other circumstances indicate that the person's credibility or information is questionable. United States v. Foolade, 703 F.2d 180 (5th Cir. 1983) (emphasis added); There is no allegation of underlying circumstances from which the affiant concluded that the informer was credible and his information reliable.

The applicant attempts to remedy this obvious flaw by stating that, "[T]his information was given by Michael Grey Jeffrey in hopes for assistance in the future and based on his declaration of penal interest ." (App. 54). While statements made against penal interest have been held to supply credibility to the person making the statement, the statement by Jeffrey is not a statement against penal interest so as to lend sufficient credibility to his statements.

The declarant Jeffrey was not making a statement against penal interest because he was already caught with the

drugs in his home. Jeffrey had previously admitted to the police that the controlled substances in his home belonged to him. At the suppression hearing, officer Cobb testified as follows:

17. Okay. And (sic) Mr. Jeffries (sic) acknowledged that both the contraband and the weapons were his, did he not?
1. Yes, sir.
17. From the get-go, from the beginning, did he not?
1. Yes, sir.
17. Okay.
1. He never denied it.
17. Before he really told you anything else, —
1. Uh-huh.
17. — correct? Now at some point after he acknowledged that the drugs and all were his, he then related to you that he could tell you his source?
A. Source, yes, sir.

By stating later that he had obtained the drugs from another individual, Jeffrey was merely stating the obvious. Every person who possesses a controlled substance obtained it from another individual, unless the individual possessing the controlled substance manufactured the controlled substance himself. Stating that the controlled substance was obtained from another individual does not expose Jeffrey to any additional criminal charges. In fact, if the controlled substance were manufactured by Jeffrey rather than obtained from some other person, that penal penalty would be even more serious.

Allowing self-serving information given by a possessor of drugs and weapons, standing alone, to provide probable cause to search an individual's residence, is a tremendous intrusion into the rights of individuals to be free of search and seizure in their homes without probable cause. There are numerous false allegations made by individuals in the jails who

have been arrested on drug charges. These allegations, like those made by Jeffrey, carry no risk of additional penal punishment to the person who made the statement, since the person has already been located with the drugs. Jeffrey admitted no involvement in a crime other than that which was already known. The fact that Jeffrey had a source was known by the police, unless Jeffrey manufactured the controlled substances himself. Only the identity of his alleged source was unknown. Revealing this identity did not subject Jeffrey to any additional penal punishment and does not fall within the "common sense" definition of a statement against penal interest. Consequently, his statement does not contain the additional assurance of reliability that is deemed to accompany true statements against penal interest.

If information such as that supplied in the Search Warrant Application in the present case were adjudged to provide probable cause, then all of the people who are mentioned by individuals in the jails as being drug sources, whether or not they have a record for dealing in drugs, are subject to having their residences searched pursuant to a search warrant. There would be no need for police to set up surveillance to check for drug traffic or set up a controlled drug purchase after any drug dealer or drug user names an individual as a drug source. The information would not even need to be corroborated by a single confidential reliable source. Instead, police may immediately obtain a search warrant and enter the home of that individual.

Certainly, the Gates standard has loosened the criteria that a search warrant application must meet to establish probable cause. These affidavits should not be interpreted "in a hypertechnical, rather than a commonsense, manner." Illinois v. Gates, 462 U.S. 213, 236 (1983) (quoting United States v. Ventresca, 380 U.S. 102, 109 (1965)). However, the fourth amendment still establishes a line between sufficient and insufficient police investigation before making an application to search the residence of a citizen. The "commonsense"

definition of a statement against penal interest is a statement that carries some additional credibility because it carries an actual risk of increased criminal punishment to the declarant. The statement by Jeffrey in the present case offers no such assurances of reliability and should not establish probable cause.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

James F. Walker
WALKER & BULLARD
Attorneys for Petitioner
Post Office Box 223
Gibsonville, North Carolina 27249
(336) 449-4909
Counsel for Petitioner